United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

74 2384

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, :

Petitioner, :

v. : No. 74-2384,
75-4001

LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, :

Respondent, :

and :

J.R. STEVENSON CORP., :

Intervenor. :

RESPONSE OF THE NATIONAL LABOR RELATIONS BOARD
TO "POINT II" IN THE BRIEF FILED BY
J.R. STEVENSON CORP., AS INTERVENOR

To the Honorable, the Judges of the United States
Court of Appeals for the Second Circuit:

The National Labor Relations Board files this response to "Point II" in the brief filed by J.R. Stevenson Corp. in its status as Intervenor herein (pp. 20-32). For the reasons stated below, the Board opposes the Intervenor's request for a modification in the Board's order.

1. On August 22, 1974, the Board issued its Decision and Order herein (A. 2-22), finding that the Union violated Section 8(b)(6) of the Act by causing the Company, Intervenor herein, to pay money to Arpad Korchma for

services not performed by him for the period commencing July 1, 1973. The Board's order, inter alia, directs the Union to reimburse the Company for any wages or other expenditures incurred as a result of the unfair labor practice after July 1, 1973 (A. 9-10, 21-22). The Board declined to find any violation of the Act for any incidents occurring in the periods preceding July 1, 1973, or to award any relief for any such incidents.

2. Thereafter, on October 24, 1974, the Board filed with this Court its application for enforcement of its order against the Union. About February 13, 1975, the Board filed the printed appendix and its opening brief. The Union's brief is presently due about March 15, 1975.

3. Meanwhile, on January 23, 1975, the Company filed a motion, pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure, seeking to intervene in the Board's enforcement proceeding. In its memorandum supporting its motion, the Company stated that it sought to intervene "as of right" because it was the "successful charging party" in the same proceeding before the Board, citing Auto Workers v. Scofield, 382 U.S. 205, 217-222 (1965), in which the Supreme Court held that a "successful charging party" has such a right. Accordingly, the Board did not oppose the motion to intervene, and on February 6, 1975, the motion was granted. On February 18, 1975, the Board received the Intervenor's brief.

4. In its brief, the Intervenor makes two contentions: first, that the Board correctly found that the Union violated the Act in the period after July 1, 1973 ("Point I", pp. 8-19); and second, that the Board erred in failing to find that the Union violated the Act prior to July 1, 1973 ("Point II", pp. 20-32). To the extent that the Intervenor's first contention supports the Board's decision herein, the Board agrees with and does not oppose it. However, to the extent that the Intervenor's second contention takes issue with the Board's decision, the Board opposes it for the following reasons.

5. The Company, in its status as an Intervenor in the Board's enforcement proceeding against the Union, has no right to challenge the Board's refusal to find additional unfair labor practices or to grant additional relief. To the extent that the Company seeks to raise such questions, it is not acting in the position of a "successful" charging party but rather that of an unsuccessful charging party. In this respect the Company is not the beneficiary of the Board's order but rather a person aggrieved by the order. Section 10(f) of the Act specifically provides that the only way that "[a]ny person aggrieved by a final order of the Board . . . denying . . . in part the relief sought may obtain a review of such order" is "by filing in [the appropriate circuit court of appeals] a written petition praying that the order of the Board be modified or set aside." The Company has not filed any such petition for review, and it is not, therefore, entitled in this proceeding to ask this Court for review. See N.L.R.B. v. Oil, Chemical and Atomic Workers

Int'l Union, 476 F.2d 1031, 1033 (C.A. 1, 1973), in which the Court expressly rejected "the availability of intervention to a charging party opposing parts of a [Board order] in light of . . . Scofield, [supra]." The Court stated (476 F.2d at 1034):

> The Court's ruling [in Scofield] created a simple and clear procedural rule: the party supporting a Board order, or the part challenged, may intervene, while the party opposing a Board order or a portion of it may petition for review . . . . Since the Union is supporting the Board's order insofar as it rejected the Company's objections, it may intervene; since the Company is attacking the Board's order, it may come into court only on its petition for review.

This principle is analogous to and consistent with the established practice in the federal courts in cases where the lower court renders a "split" decision--finding for one party on some but not all of his claims. In that instance, if the defendant-appellant appeals the portion of the judgment adverse to him, the plaintiff-appellee cannot, on appeal, ask the reviewing court to consider the portions of the judgment adverse to him unless he too files an appeal or cross-appeal. See 9 J. Moore, Federal Practice Para. 204.11 [5] at 948 (2d ed. 1973):

> A party who intends to attack a judgment brought up for review by another may fairly be obliged to give advance notice of his intention by the simple and inexpensive method of filing his own notice of appeal. The party who initiates review is entitled to such notice . . . .

It is also analogous to and consistent with the Supreme Court's practice. See Stern and Gressman, Supreme Court Practice 310 (4th ed. 1969).

The Board is not now barred from raising the issue of the Company's right as Intervenor to attack the Board's order because the Board originally consented to the Company's motion to intervene. As we have shown, at that time the Board was under the impression that the Company was only seeking intervention in its status as the "successful charging party," and that, if the Company were allowed to intervene, it would do nothing more than support the Board's order. Since the Board was thus unable to and did not raise the issue at the time of intervention, the issue is, we submit, properly before the Court now.

This Court's decision in National Maritime Union v. N.L.R.B., 423 F.2d 625 (C.A. 2, 1970), does not compel a contrary result. In that case, the charging party before the Board sought to intervene in the enforcement proceeding, specifically stating that if it were permitted to do so it would ask for judicial review of the parts of the Board's order adverse to it. The Board opposed intervention for that purpose, but the Court, acting through a single judge, granted the motion for intervention without any limitations.

Under the circumstances, when the case later came before the three-judge panel assigned to hear it on the merits, the Board did not reargue the question of the propriety of the intervention and the Court did not reconsider it. The case is, therefore, not a precedent in this Circuit on this issue.

6. In any event, the Board properly refused to find any unfair labor practices prior to July 1, 1973, or to award any relief for this period. The original complaint issued in this case by the General Counsel (copy attached) specifically alleged only that the Union's actions after July 1, 1973, constituted unfair labor practices within the meaning of the Act. The complaint contains no allegations that any conduct of the Union prior to July 1, 1973, was unlawful. At no time in the proceeding before the Administrative Law Judge or the Board did Counsel for the General Counsel seek to amend his complaint to allege the events prior to July 1, 1973, to be unlawful, nor did the Company ask for or obtain any such amendment. Indeed, when the issue of awarding any relief for the pre-July 1 period arose first before the Administrative Law Judge and then the Board, the General Counsel, consistent with his complaint allegations, each time objected to any such relief (See A. 14; see also the portion of the General Counsel's brief to the Judge attached to this response). Under these circumstances, the Board was without power to find any unfair labor practices prior to July 1. As this Court held in the identical situation in National Maritime Union v. N.L.R.B., supra, 423 F.2d at 626:

> It is apparent that the General Counsel cannot be compelled either by the Board or this court to bring an action or amend his complaint because under § 3(d) of the Act he "has unreviewable discretion to refuse to institute an unfair labor practice complaint," Vaca v. Sipes, 386 U.S. 171, 182 (1967), nor can the equity power of a court compel the General Counsel to amend his complaint, no matter how heinous the wrong sought to be remedied. United Electrical Contractors Association v. Ordman, 366 F.2d 766 (2 Cir. 1966).

The fact that there is evidence in the record concerning the pre-July 1 events does not vest the Board with the necessary power. That evidence was introduced by the General Counsel, as he made clear in his opening statement (see Tr. 6, copy attached), solely for "background." At no time did the General Counsel indicate that by introducing such evidence he was thereby consenting to an amendment of his complaint, and in fact, as we have noted, the General Counsel subsequently twice reaffirmed his position that the issues in the case were confined to the post-July 1 incidents. See National Maritime Union v. N.L.R.B., supra, 423 F.2d at 626-627.

Moreover, even assuming that the Board could go behind the allegations of the General Counsel's complaint, it would be inequitable for the Board to do so here where the entire case was pointedly tried on the premise that the events prior to July 1 were not in issue. Thus, at no time during the trial in this case did either the General Counsel or the Company give the Union any notice that its conduct prior to July 1 might be found illegal. As this Court held in a similar situation in N.L.R.B. v. Majestic Weaving Co., 355 F.2d 854,861 (C.A. 2, 1966):

> the time for giving notice of the matters of fact and law asserted is prior to the hearing, not in what the Board calls "General Counsel's post-complaint theory of the case" unveiled in a post-hearing brief.

For, if the Board were to make a finding under such circumstance,

> a serious question must arise whether a respondent has not been denied a full and fair hearing on the unlawful conduct with which it has been charged.

WHEREFORE, the Board respectfully prays that the Court deny the Company any additional relief beyond that already awarded by the Board.

Respectfully submitted,

Elliott Moore, by
John D Burgoyne

Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.
this 10th day of March, 1975.

UNITED STATES COURT OF APPEALS
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NATIONAL LABOR RELATIONS BOARD, :

Petitioner, :

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LOCAL 456, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN :
AND HELPERS OF AMERICA,

Respondent. :

and :

J.R. STEVENSON CORP., :

Intervenor. :

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Board's motion for leave to file its response to "Point II" in the brief filed by J.R. Stevenson Corp., as intervenor, and the accompanying response, in the above-captioned case has this day been served by airmail upon the following counsels at the addresses listed below.

John J Sheehan, Esquire
Attorney at Law
51 Chambers Street
New York, N.Y. 10007

Rains, Pogrebin & Scher
ATTN: Joel H. Golovensky
ATTN: Bruce R. Millman
210 Old Country Road
Mineola, New York 11501

Dated at Washington, D.C.
this 10th day of March, 1975.

Elliott Moore, by
John D Burgoyne

Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

second, your Honor?

JUDGE SEFF: Off the record.

(Discussion off the record.)

JUDGE SEFF: Do you want to be heard on the motion?

MR. GOLOVENSKY: No, your Honor, I'll have no objection.

JUDGE SEFF: The motion is granted.

This is the point in the proceeding where general counsel makes an opening statement if he wishes to.

MR. TRUNKES: Yes, your Honor, I would like to familiarize you with the facts we intend to prove.

We intend that the charging party, J. R. Stevenson Corp.is a general contractor involved in the construction of a courthouse complex in White Plains.

And this is a $35 million project which began in 1969, and the last we were informed, the expected completion date was to be December 31st of this year.

Now, Stevenson had been a member of the Building Trades Employers Association of Westchester, Inc. since the early 1950's.

On or about July 1st of 1970, the BTEA which has had collective bargaining contracts with various trade unions in Westchester County, first entered into an agreement with Local 456.

Early in the 1971, which had had collective bargaining agreements with various trades unions, through its membership in the BTA, but never agreement with Local 456, was approached by representatives of 456 and requested to sign the association agreement.

At the time, Stevenson took the position that it was not necessary for it to sign the agreement inasmuch as it belonged to the BTA and therefore was bound by any agreement entered into by the association.

Subsequently Stevenson -- and this, of course is background, your Honor -- subsequently Stevenson was picketed by Local 456 and its operating engineers who were members of Local 137 of the International Union of Operating Engineers, refused to work, apparently in sympathy withLocal 456.

Thereafter Stevenson signed the association agreement.

Shortly thereafter and pursuant to this agreement Stevenson was required to employ a shop steward of Local 456 and maintain a heated trailer for him.

Prior to the employment of an individual named Arpad Corchma as the steward, Stevenson had not employed any teamsters.

Now, the evidence we understand, it happens that Corchma spent his time in the heated trailer, leaving

only to check on teamsters union membership status of drivers making deliveries to the construction site, and never himself drove any trucks for Stevenson or performed any other services for the company.

And he was paid at that time $306 a week under the contract.

Now, sometime in 1972 Stevenson, having been required to employ Korchma inquired into the possibility of leasing or purchasing a pick-up truck to be used for an on-the-site jockeying of materials and supplies, on the site.

Stevenson contacted Local 456 and was informed that the shop steward would not be permitted to drive the pick-up truck but, rather, that Stevenson would be required to employ another teamster to drive the truck while the shop steward continued to sit in the trailer.

Stevenson did not pursue the matter any further.

In other words, he did not employ any teamsters, he did not do any trucking on the job site.

November of 1972 Stevenson resigned from the BTEA and immediately thereafter joined the Builders Institute of Westchester and Putnam Counties which has had Association-wide agreements with various trade unions but no agreement with Local 456.

On April 9th of this year Local 456 advised Stevenson by letter that since the agreement between them was to terminate on July 30th of this year, it wished to meet for the purpose of negotiating a new agreement.

Stevenson - letter

On June 27th Stevenson replied to the letter by stating, "Inasmuch as we do not employ teamsters in any of our operations, nor do we have a need to employ such labot, we see no need to enter into negotiations for a new contract."

On June 29th, Stevenson laid off its employee, Korchma and forwarded to him a check for all the money owned him.

He had refused to accept a check on the date that he was being laid off.

On July 2nd, I should say July 3, 1973, as a direct result of the refusal to enter into a negotiation for a new contract and the lay-off of Korchma, Local 456 began picketing at the construction site.

I might add, your Honor, that this picketing was the subject of two charges filed by the charging party, which were dismissed by the general counsel involving a secondary boycott and recognition under the Section 8(b)7.

JUDGE SEFF: Yes.

MR. TRUNKES: However, they also filed the present charge which the general counsel agreed to issue

a complaint.

On July 10th of 1973, within eight days after the picketing started, Stevenson rehired Korchma as the teamster shop steward and on thd same date it entered into a new collective bargaining agreement with Local 456 which contract was effective from July 1st and continuing to June 30, 1976.

And pursuant to this agreement, Korchma's weekly salary will be or is $325 a week.

And it is our -- further, since the rehiring of Mr. Korchma, he continues to perform the same work that he performe-d prior to his lay-off, which is sitting in the trailer, checking on trucks entering the job site for union affiliation, and not performing any services at all for J. R. Stevenson.

The charging party filed the present charge under the 8(b)6 portion of our Act.

And we feel, your Honor, that under the two Supreme Court decisions that issued in 1953, I believe Gamble is one of them, American Newspapers is another, and I will recite you this on the closing argument, in which the Supreme Court stated that if no work is being performed by the person for the employer, it would be considered a violation of 8(b)6.

MR. GODOVENSKY: Yes, sir.

COMPLAINT AND NOTICE OF HEARING

It having been charged by J.R. Stevenson Corp., herein called the Company, that Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 456, has engaged in, and is engaging, in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director, Region 2, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations - Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The Charge in this proceeding was filed by the Company on July 9, 1973, and served by registered mail upon Local 456, on or about July 10, 1973.

2.(a) The Company is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

(b) At all times material herein, the Company has maintained an office and place of business at 175 Fulton Avenue, Hempstead, New York, where it is, and has been at all times material herein, continuously engaged in providing general contractor services and related services.

(c) At all times material herein, the Company has been engaged as the general contractor, pursuant to a tweny-one million dollar contract with the County of Westchester in the State of New York, in connection with the construction of a courthouse complex located at Quarropas and Grove Streets in White Plains, New York, herein referred to as the Courthouse Complex.

(d) During the past year, which period is representative of its annual

operations generally, the Company in the course and conduct of its business, purchased and caused to be transported and delivered to the Courthouse Complex, lumber and other goods and materials valued in excess of $1,000,000, of which goods and materials valued in excess of $1,000,000 were transported and delivered to the Courthouse Complex in interstate commerce directly from states of the United States other than the state in which it is located.

(e) The Company is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2),(6) and (7) of the Act.

3. Local 456,is, and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

4. Arpad Korchma is, and has been at all times material herein, the shop steward, of Local 456, acting on its behalf, and agent thereof.

5.(a) On or about July 2,3,5,6,9 and 10, 1973, Local 456 by Arpad Korchma and other members of said organization whose names are presently unknown, picketed and threatened to continue picketing the Courthouse Complex if said Company did not enter into a collective-bargaining agreement with Local 456.

(b) On or about July 1, 1973 the Company as a result of the conduct described above in subparagraph (a), executed a collective-bargaining agreement with Local 456 effective from July 1, 1973 to June 30, 1976.

6. On or about July 10, 1973 the Company, pursuant to the agreement described above in paragraph 5, hired Korchma and provided a heated trailer for his use and paid wages to Korchma and paid for the expense of maintaining a heated trailer for him.

7. Since on or about July 1, 1973 the Company has been required by Respondent to maintain in force and effect the agreement described above in paragraph 5 and to continue the payments described above in paragraph 6 although Korchma did not perform services for the Company nor was he to perform any services for the Company.

8. By the acts described above in paragraphs 5,6 and 7 and by each of said acts, Respondent engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(6) and Section 2(6) and (7) of the Act.

9. The acts of Local 456 described above in paragraphs 5,6,7 and 8 occurring in connection with the operations of the Company described above in paragraph 2, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 25th day of October 1973, at 11:00 a.m., at 26 Federal Plaza, 36th Floor, in the City and State of New York, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise and give testimony.

You are further notified that, pursuant to Sections. 102.20 and 102.21 of the Board's of the Board's Rules and Regulations, the Respondent shall file with the Regional Director, Region 2, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to the said Complaint within ten (10) days from the service thereof, and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted by it to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

Form NLRB-4668, Statement of Standard Procedure in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases is attached.

Dated at New York, New York this 20th day of September 1973.

Winifred D. Morio

Winifred D. Morio, Acting Regional Director
National Labor Relations Board
Region 2
26 Federal, Plaza, Room 3614
New York, New York 10007

V. THE REMEDY

General Counsel respectfully requests that Respondent be ordered to reimburse Stevenson for wages paid to Korchma subsequent to July 1, 1973, in addition to the usual cease-and-desist Order.

Respondent has argued that the violation, if any existed, has existed since 1970, and therefore, "the statue of limitations"contained in the Act is applicable here.(Tr. 13)

Although he may be correct that this situation has existed since 1970, it is the opinion of General Counsel that by accepting this situation without complaint until July 1, 1973, Stevenson is estopped from claiming any damages prior to that date. In good faith, Stevenson paid wages to the Teamster in its employ until its agreement with Respondent expired June 30. The present charge and complaint relates solely to the enforced hiring of Korchma subsequent to July 1, 1973. Thus, General Counsel contends that it is only for this limited period, within the Statute of Limitations, that Stevenson be reimbursed for payment of money to Korchma or any other employee which may in the future be employed by Stevenson under its present agreement with Respondent.

VI. CONCLUSION

For the reasons advanced herein and on the record as a whole, it is respectfully submitted that the Administrative Law Judge find the violation, as alleged, and issue an appropriate remedial order as requested.

Respectfully submitted,

Thomas T. Trunkes

Thomas T. Trunkes
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza
New York, New York 10007

Dated: December 20, 1973
at New York, New York